No. 16,295

IN THE

United States Court of Appeals

For the Ninth Circuit

TODD SHIPYARDS CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S ANSWER TO APPELLANT'S PETITION FOR A REHEARING.

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Table of Authorities Cited

Cases

Statutes

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To the Honorable William E. Orr and Oliver D. Hamlin, Jr., Circuit Judges, and William J. Jameson, District Judge:

Appellant's Petition for Rehearing proceeds, somewhat disingenuously, we believe, from erroneous assumptions about the position of Appellee and the ruling of the Court to the erroneous conclusion that this Court should now go outside the scope of this appeal to grant a motion for action by the District Court which that Court itself has never yet been asked to take.

Appellant is quite incorrect in stating that "it is conceded that Todd's claim is not subject to limita-

tion" (Pet. for Rehearing 2). On the contrary, the Government's Petition for Exoneration from or Limitation of Liability, in Article X (R. 7), alleges that Todd's claim against the United States is "on the basis of alleged acts and failures to act of Petitioner as owner of the TROJAN (ex JEANNY)", and Todd's Answer admits this (R. 30). Todd, in its Petition to Implead (Art. XII, R. 129), Libel (Art. XII, R. 139) and Complaint (Para. XI, R. 149) and even in its Claim (Art. X, R. 23-24), flatly charges the Government with "fault and negligence" through its "employees having custody, possession, supervision and control over the [TROJAN]".

Both in the District Court and on appeal it has been common ground to the parties that Todd was claiming on two theories: (1) alleged fault and negligence of the United States, committed by its employees, as owner of the JEANNY (now TROJAN) prior to her sale, and (2) alleged fault and breach of warranty of the United States, committed by its employees, as vendor in selling the TROJAN with her stores and fuel aboard. Todd contended that its mere assertion of its claim on its additional theory No. 2 precluded the United States from limitation of liability against Todd's and others' claims on Theory No. 1. But the Court below recognized the character of Todd's claim against the United States as owner. Thus in its order, when it referred (R. 112) to the possibility of claims clearly subject to limitation it did not exclude Todd's claim; it was surely not referring to mere speculative or conjectural claims

arising out of some other circumstances than those in suit, and there was no basis upon which it could have drawn any distinction, if it had tried, so far as limitation is concerned, between the pleadings of Todd and those of the many other claimants who had filed their claims before the decree of default.

The District Court correctly chose to follow the course indicated by *Petition of Great Lakes Transit Corp.,* 63 F. 2d 849, 1933 A.M.C. 1019 (6th Cir.) and *J. Ray McDermott & Co. v. Hunt Oil Co.,* 262 F. 2d 127, 1959 A.M.C. 384 (5th Cir.), recognizing that the character of disputed claims is not to be ultimately determined by the pleadings or by epithets applied by the claimants but by the facts which may actually be proved upon trial. It is immaterial whether Todd may also make a claim based upon its theory of an alleged "vendor's liability" as distinct from shipowner's liability which is subject to limitation, and this the District Court recognized in saying that the availability of limitation proceedings could not be avoided "merely by the form of the pleadings or the theory of the claim asserted" (R. 113). This case has always concerned the claims of Todd as presented by its pleadings and never the abstract question of the relationship of limitation to a claim based upon a vendor's warranty in a contract of sale. Todd's attempt, in argument, to characterize its claim as one upon a vendor's warranty has never been concurred in by the Government nor endorsed by the courts.

Todd is unwarranted in assuming that its claim can be excluded from those to which this Court was re-

ferring when it said in its opinion of January 15, 1960 that "there is a possibility of claims being asserted in this cause which are clearly subject to limitation". Todd attempts to convert this Court's ruling into a holding that its claim is not subject to limitation by inserting the italicized word "other" into its paraphrase of this Court's opinion (Pet. for Rehearing 3). The District Court had clearly understood that Todd's claim was pleaded as a claim for liability as an owner and we suggest that there is nothing in this Court's affirmance to support the exclusion of Todd's claim, at the pleading stage, from those claims subject to limitation.

Any sincere and practical effort of Appellant to proceed exclusively upon the non-maritime contract of sale, for breach of warranty, upon a vendor's liability theory, as Todd implies that it would like to do, would have to be accompanied, at the very least, by measures to eliminate its charges against the United States as shipowner, not merely from current arguments but from the pleadings, by the striking of its Claim and Answer in this cause and by the dismissal of its Petition to Implead, Libel and Complaint, previously filed.[1] All this Appellant makes no offer to do,

[1]If Todd is serious about restricting its claim to one of "vendor's liability" and asserting that it is not subject to limitation, its obvious first step is to dismiss its own claim in this limitation proceeding. In its Petition to Implead (R. 124) and Libel (R. 134), Todd relies for jurisdiction upon the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525 (as amended, 46 U.S.C. §741 *et seq.*) and the Public Vessels Act of March 3, 1925, c. 428, 43 Stat. 1112 (as amended, 46 U.S.C. §781 *et seq.*). Since, in the present context, the United States could only be sued under these acts as the owner of the vessel and since the non-maritime con-

let alone suggest how all this might appropriately be accomplished in this appellate Court. Of course the appropriate forum for such action is the District Court, which has before it all of the causes affected. But no such motion as Appellant now makes to this Court in the guise of a Petition for Rehearing has ever been made below, where the entire thrust of Appellant's motion was against the jurisdiction of the District Court to entertain the limitation proceeding in its entirety.[2] We are at a loss to understand why this Court should be asked to transact District Court business which has never been presented to the District Court. The use of a petition for rehearing to enlarge the scope of an appeal in this manner is improper. *Higa v. Transocean Airlines,* 230 F. 2d 780, 1956 A.M.C. 122 (9th Cir.), *Mitchell v. Greenough,* 100 F. 2d 1006 (9th Cir. 1939).

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tract of sale is not of admiralty jurisdiction anyway, Todd should dismiss its Petition to Implead and its separate Libel. Finally, it should also dismiss its Complaint (R. 144) which relies for jurisdiction upon the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 *et seq.,* since a claim "arising out of . . . misrepresentation" is barred under that Act (see Brief for Appellee, p. 31, note 46) and a contract claim would manifestly not fall within the Act. Appellant has not pleaded a case under the Tucker Act, 28 U.S.C. §1346(a) in any of its actions yet filed.

[2]Appellant's statement in its Petition for Rehearing (pp. 1-2) that its motion below was to dismiss the Petition and vacate the restraining order "as to Todd" should not mislead anyone into supposing that its motion below was limited to anything less than complete dismissal of the action and vacation of the order as to all parties.

CONCLUSION.

For the foregoing reasons we submit that Appellant's Petition for Rehearing should be denied.

Dated, San Francisco, California,
February 17, 1960.

Respectfully submitted,

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